Supreme Court, U.S.
FILED
951177 JAN 23 1996
OFFICE OF THE CLERK

No. _____

****

IN THE

Supreme Court of the United States

October Term, 1995

****

DR. KARUNAMOY CHATTERJEE

Petitioner

v.

CITY OF BATON ROUGE, ET AL

Respondents

****

On Petition for Writ of Certiorari
To the Supreme Court of Louisiana

****

PETITION FOR A WRIT OF CERTIORARI

****

Karunamoy Chatterjee
Plaintiff/Petitioner
50-B Arcadia Road
Hackensack, NJ: 07601
(201) 342-7823
January 24, 1996

QUESTIONS PRESENTED

The Director of the Department of Public Works (DPW) discharged the petitioner without due process of law for his June 27, 1988 letter which involved a matter of public concern as admitted by the respondents. In a meeting between just the two of them, the Director verbally instructed the petitioner not to send its copies to his elected officials. The petitioner never disobeyed the Director's directive. The appellate courts concurred that this dismissal did not violate the petitioner's freedom of speech rights because matter in the letter had a "direct connection" to the petitioner's employment. In light of these provisions, the questions presented are:

1) Whether government as employer can dismiss an employee as citizen for protected speech when the speech is connected to the duties of the employee but do not interfere with the efficient or regular operation of public service; whether any greater advantage or significance should be accorded to the government to show that the protected speech does interfere in the regular operation of public service; if such a restrictions on speech can include a prohibition to contact elected representatives about the matter of public concern after internal means had been exhausted?

2) Whether a government agency is bound by the Fourteenth Amendment in its dismissal practices of civil service employees; if due process, such as but not limited to adequate notice, meaningful pretermination hearings, is not required of that agency; does the suspension and subsequent dismissal practices by the government agency give a civil service employee an opportunity to defend against the alleged charges and maintain his 14th Amendment rights of the U.S. Constitution ?

LIST OF PARTIES

The petitioner in this case is Dr. Karunamoy Chatterjee.

The respondents are the City of Baton Rouge, et. al.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW----	i.
LIST OF PARTIES ----------	ii.
OPINIONS BELOW----------	2
JURISDICTION ----------	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE ----------	3
1. PROCEEDING BEFORE THE PERSONNEL BOARD--------	6
2. 19TH JUDICIAL DISTRICT COURT HEARING-	7
3. COURT OF APPEAL, FIRST CIRCUIT ----	7
4. SUPREME COURT OF THE STATE OF LOUISIANA ----------	10
REASONS FOR GRANTING THE WRIT ----------	10
CONCLUSION ----------	19
PERTINENT INFORMATION ABOUT CASE	
PETITIONER'S JUNE 27, 1988 LETTER--------	20
DISMISSAL LETTER DATED JULY 8, 1988---	23
COUNCIL ADMINISTRATOR'S LETTER-----	26
COUNCILMAN DAVID BRAUD'S LETTER---	27
COUNCIL MEMBER'S LETTER----------	28
CLERK OF THE COURT--AFFIDAVIT-----	29
APPLICATION FOR REHEARING---------	30
APPENDIX ----------	1a
DECISION OF THE CITY PARISH PERSONNEL BOARD HEARING----------	1a
DECISION OF THE LOUISIANA 19TH DISTRICT JUDICIAL COURT----------	7a
DECISION OF LOUISIANA COURT OF APPEAL, FIRST CIRCUIT----------	8a

TABLE OF CONTENTS--continued

DECISION FOR APPLICATION FOR REHEARING---------- 24a
DECISION OF THE SUPREME COURT OF THE STATE OF LOUISIANA---- 25a

TABLE OF AUTHORITIES

	Page
CASES	
Connick v. Meyers, 461 U.S. 138, 103 S. Ct. 1684 (1983)----------	12
Garrison v. Louisiana, 379 U.S. 64 (1964)----	11
Moore v. City of Kilgore, 877 F. 2d. 364 (1989)----	12
Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937)-----	17
Pickering v. Board of Education, 391 U.S. 563 (1968)-----	10, 11
Waters v. Churchill, 114 S. Ct 1878 (1994)-	12
Wood v. Georgia, 370 U.S. 375 (1962)-----	11
CONSTITUTIONS	
U.S. Constitution Amendment I------	2
U.S. Constitution Amendment XIV-	2
STATUTE AND REGULATIONS	
28 U.S.C. Section 1257------	2

****

No._____

****

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

****

DR. KARUNAMOY CHATTERJEE
Petitioner
v.
CITY OF BATON ROUGE , ET AL.,
Respondents

****

On Petition for Writ of Certiorari
To the Supreme Court of Louisiana

****

PETITION FOR A WRIT OF CERTIORARI

****

The Petitioner, Dr. Karunamoy Chatterjee petitions for a writ of certiorari to review the judgment of the Supreme Court of Louisiana in this case.

****

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana (No. 95 C 1826) denying the writ of review of the decision of the Court of Appeal, First, Circuit, State of Louisiana, is not yet reported. The opinion of the Court of Appeal, First Circuit (No. 94 CA 1025) on the decision of 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana has not yet published in any reporter. The opinion of 19th Judicial District Court (Number 345,670 Division C) affirming the judgment of the City-Parish Personnel Board is also not published in any reporter.

****

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on October 27, 1995 (Docket No. 95 C 1826). The Jurisdiction of this court is invoked under 28 U.S.C. Section 1257.

****

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part :

> Congress shall make no law...abridging the freedom of speech...and to petition the government for a redress of grievances.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ...Nor shall any state deprive any person of life, liberty,

or property, without due process of law.

****

STATEMENT OF THE CASE

The petitioner gained his permanent employment status as a civil servant and worked seven years in the East Baton Rouge City-Parish in the classified service for the Department of Public Works (DPW) as a Professional Engineer III. On July 8, 1988, the DPW wrongfully discharged him. The alleged grounds were 1) incompetence and 2) insubordination. The City-Parish Personnel Board overruled the disciplinary action on the incompetence issue, but upheld petitioner's dismissal on the grounds of insubordination (App. 1a-6a). Both charges were found without merit by Administrative Law Judge C.B. King of the Louisiana Office of Employment Security.

The petitioner was accused of disobeying a verbal instruction by the then DPW director, Bill Howe, who forbade the petitioner from sending copies of a June 27, 1988 letter to the Mayor, two Councilmen and the Council Administrator (Dismissal letter, p. 23, par.1). These officials were listed on the correspondence to receive copies (Petitioner's letter, p.22). The petitioner was dismissed from employment on July 8, 1988 because Mr. Howe received a draft copy of the letter from the secretary of one of the elected officials. Without investigating further, Mr. Howe dismissed the petitioner.

The letter in question (Petitioner's letter, pp. 20-22) contained a request to the DPW Director, Bill Howe, for a thorough investigation into a mistake made by a DPW employee. The petitioner had previously submitted the complaint twice to Mr. Howe but received no response (Ex. Chatterjee 15). This

letter also indicated another mistake made by a DPW employee. The two mistakes involved two gravity sewer lines: one was incorrectly designed and the other was incorrectly installed. Neither the design nor the installation followed the Ten States Standards (Ex. Chatterjee # # 14, 15, 70, 71, 72, 75, 79, Ex. DPW # 5, Tr., Richard, pp. 80-82, 85-86, Tr., Chatterjee, December 2, 1988, pp. 124-130). Before being transferred to the Wastewater Division the previous year, the petitioner had been involved in both the projects and had the knowledge and expertise to critically evaluate them.

The fact is the petitioner never sent any copies of the letter outside the department before or after the verbal directive from Mr. Howe (Letters, pp. 26-28). The City-Parish did not produce any evidence, whatsoever, supporting its claim that the petitioner did so. It is evident from the testimonies of both Mr. Howe and Ms. Elam, secretary to the then Councilman Mike Roubique, that the petitioner had not done what he was accused of. (Tr., Howe, pp. 97, 124-125, 127-130, 135-139, 185-188 ; Tr., Elam, pp. 202-206 ; Ex. DPW # 5 and Ex. Chatterjee # 87). The fact is that five days prior to Mr. Howe's ultimatum, on June 22, 1988, the petitioner had sought the advice of the secretary and shared the draft letter of his June 27, 1988 letter with her. This draft letter was undated and unsigned and was substantially different from the June 27, 1988 letter which Mr. Howe forbade from distributing (Petitioner's letter, pp.20-22, Ex. Chatterjee 87 and Tr., Howe, pp. 137-139). Mrs. Elam made a promise to the petitioner of not sending it to anyone .

On June 30, 1988, just three days after Howe's verbal directive to the petitioner, Ms. Elam sent a note requesting Bill Howe "to hear him out" (Ex. Chatterjee 28-A) and attached the draft letter which the petition had given to her prior to the directive. Mr. Howe received the draft letter "about seven or

eight days later" (Tr., Howe, p. 100), i.e. either on July 5th, or 6th of 1988. After receiving the draft letter, Mr. Howe assumed that the petitioner had sent out the copies of the June 27, 1988 letter; he never investigated the possibility that his assumption was wrong (Tr. Howe, p. 186). Mr. Howe never verified or realized the dissimilarity of these two letters (Petitioner's letter, pp. 20-22, and Chatterjee # 87 and Tr. Howe, pp. 137-139, 185-187). Mr. Howe never asked Ms. Elam when and how she had received that draft letter from the petitioner (Tr. Howe, pp.186-187). Far from conducting a pretermination hearing, Mr. Howe did not even confront the petitioner with the memo and give him an opportunity to defend himself against the allegations.

The City-Parish did not produce any evidence, whatsoever, that the petitioner's request to the DPW Director in the letter of concern for a thorough investigation into the mistakes had impaired the effective and efficient operation of the Public service in which he was engaged.

On July 6, 1988, the letter dated July 8, 1988, (Dismissal letter, pp. 23-25) was prepared which indicated the charges against the petitioner and the decision of his simultaneous suspension and dismissal and attached to the Personnel Form No. 4 (PERSONNEL STATUS CHANGE) and sent to the Personnel Department which received it on July 8, 1988. (AP.EX. 6).

On July 8, 1988, at about 3:00 P.M., one hour before the petitioner's business day was over, the petitioner was called to see Mr. Howe at his office. The petitioner met Mr. Howe and Mr. Horace Elkins, the business manager at the office. Mr. Howe showed him the letter which he had received from Ms. Pat Elam, the secretary to Councilman of the petitioner's own district. Mr. Howe told the petitioner that because the petitioner had disobeyed instruction by sending the copy of petitioner's June 27,

1988, letter to Ms. Elam, he was suspending the petitioner from the next day onward and his dismissal would be effective immediately thereafter. At that time, Mr. Howe handed the petitioner a package that contained the letter of dismissal and other papers. The petitioner recognized the letter received by Mr. Howe from Ms. Elam as the draft letter and explained to Mr. Howe that the letter was a draft letter without any date nor his signature and that it was given to Ms. Elam prior to Howe's June 27, 1988 directive. Mr. Howe told the petitioner that the petitioner would receive the same package under Certified mail at his home address. The petitioner left the office with his suspension and subsequent dismissal.

1. PROCEEDING BEFORE THE PERSONNEL BOARD

The petitioner was discharged on July 8, 1988, and the case was appealed to the court of first instance, in this case City-Parish Personnel Board, on August 4, 1988. The proceedings before the Board began on October 25, 1988. One Board member, Henry Baptiste, recused himself. Therefore, the two remaining Personnel Board members conducted this hearing. The evidence was taken on the following four days: October 25, October 27, December 1 and December 2, 1988; these hearings lasted approximately 24-hours in total. Fourteen witnesses testified including Mr. Howe, the DPW Director, Mr. Harold Norman, the petitioner's immediate supervisor, Mr. Richard, the DPW Chief Engineer and the petitioner himself.

At the end of the December 2, 1988 proceeding, the Board Chairman, Mr. Dan Moller, also recused himself from further presiding over the hearing. The next proceeding was on January 30, 1989, and Ms. Rita Williams was the only Personnel Board member present. Jim Llorens, the Personnel Director, presided although no evidence was taken.

The City-Parish Metropolitan Council appointed two ad hoc members to the Personnel Board to continue the hearing. On October 3, 1989, the hearing of the case concluded before these two ad hoc members, who had not heard the testimony from day one, and Ms. Rita Williams, the lone Personnel Board member. They heard the petitioner's testimony - which was 90 minutes long and the testimony of nine remaining witnesses. The Personnel Board rendered its judgment on October 19, 1989 against the petitioner. App. 1a-6a.

2. 19TH JUDICIAL DISTRICT COURT HEARING

In City-Parish Personnel Board hearing, both issues, Freedom of Speech and Due Process of Law, were raised (Tr., Chatterjee, dated October 3, 1989). When the case was appealed to the Judge Bob Hester's 19th Judicial District Court, both issues were presented for review in the petitioner's brief (Petitioner's Brief - FREEDOM OF SPEECH, pp. 10-29; NOTICE AND PRETERMINATION HEARING, pp.29-31). The questions of Freedom of Speech and Due Process of Law were also raised in oral arguments as well.

In its "Oral Reasons for Judgment," the District Court states, "All I can go upon is the record. This is an appeal, and the finding of the Board is affirmed." It rendered its judgment on September 20, 1993. App. 7a.

3. COURT OF APPEAL, FIRST CIRCUIT

Both issues, Freedom of Speech and Notice and Pretermination Hearing, were presented for review in the Plaintiff's initial brief in separate sections (FREEDOM OF SPEECH, pp. 12-23; NOTICE AND PRETERMINATION HEARING, pp.23-24).

On April 7, 1995, the First Circuit Judges rendered their judgment in this case. App. 8a-23a. In its judgment, on Freedom of Speech issue, the Court of Appeal, First Circuit, stated:

> "The appellees do not contest the fact that Dr. Chatterjee's letter addressed a matter of "public concern." However, as they correctly point out, Dr. Chatterjee's letter also addressed a matter that had a direct connection with his own employment, a sewer project on which he had worked."

and finally concluded:

> "Because we find the restriction on Dr. Chatterjee did not violate his First Amendment rights under Pickering guidelines, there is no merit to this assignment of errors." Decision of Court of Appeal, First Circuit, State of Louisiana, under Assignment of Error Number 2, App. 16a-17a.

On the issue of Due Process of Law, the First Circuit judges made the statement as follows:

> "The appellees contend that the issue raised by this assignment of error is not properly before us on appeal; that there is nothing in the record for us to consider regarding this issue because Dr. Chatterjee did not raise the issue at the hearing before the Board." Decision of Court of Appeal, First Circuit, State of Louisiana, under Assignment of Error Number 3, App.17a.

This statement was erroneous and it was realized that the record of the petitioner's 90-minutes-long-testimony (Tr., Chatterjee, dated October 3, 1989) was not in the court record.

This omission was verified by the employee of the Clerk of Court of the 19th Judicial District Court. (Page 29 of this petition). Without the petitioner's testimony in the record, it appeared that the judgement of the District Court was given without the review of petitioner's testimony. Similarly, First Circuit Court had also made its decision without the review of petitioner's very crucial testimony.

The Court of Appeal, First Circuit, finally concluded :

> "we find the July 8th meeting , which appellant in his brief to the district court admitted attending, satisfied the due process rights appellant now asserts. Accordingly, we find no merit in this assignment of error." Decision of Louisiana Court of Appeal, First Circuit, under Assignment of Error Number 3, App. 18a.

An application for rehearing (page 30 of this petition) along with a "Support Brief" was submitted on April 21, 1995 which indicated the following:

> "The first reason this court should grant rehearing is that the City-Parish Personnel Board did not prepare a transcript of the appellant's testimony as required by law. Thus neither this court nor the District Court was able to review the testimony of Dr. Chatterjee....The second reason is that many statements in the Court's decision are erroneous." Application for Rehearing , page 30 of this petition.

The "Support Brief" responded to each and every "inaccuracies" thought by the court including Freedom of Speech and Due Process of Law issues. The request for rehearing was denied on June 21, 1995 without comment. Decision on

Rehearing , App. 24a.

4. SUPREME COURT OF THE STATE OF LOUISIANA

The application for writ of review of the decision of the Court of Appeal, First Circuit, was submitted to the Supreme Court of the Louisiana State on July 20, 1995. In that application, several issues including Freedom of Speech and lack of Due Process (i.e. Notice and Pretermination Hearing), were presented for review in separate sections (Application for Writ of Review, FREEDOM OF SPEECH, pp. 9-14; NOTICE OF PRETERMINATION HEARING, pp. 14-16). The application for Writ of Review was denied on October 27, 1995 without comment. Decision of the Supreme Court of the State of Louisiana, App. 25a.

****

REASONS FOR GRANTING THE WRIT

1. The Supreme Court has previously ruled about what allows government as employer to have a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large. However, the Louisiana Court of Appeals, First Circuit erred when considering *Pickering v. Board of Education* , 391 U.S. 563 (1968). In attempting to balance the interests of government as employer "to promote the efficiency in public service, maintains discipline, increase harmony among co-workers and promotes loyalty and confidence in positions where such traits are of importance" against those interests of the employee to address a matter of public concern, the Court erroneously concluded that "*Pickering* also holds that the legitimate interests of the

individual and the public statements are greatest when they have no direct connection with the employee's employment or duties and are not directed at a nominal superior." App. 16a. In denying the writ for certiorari of this petitioner, the Louisiana Supreme Court thereby upheld this erroneous conclusion.

The fact is that the *Pickering* Court recognized the importance of the connection between the employee's making a protected speech of a matter of public concern and their direct employment; Justice Marshall wrote:

> Teachers are, as a class, the member of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. *(Pickering v. Board of Education 391 US 572)*

The Court reiterated:

> "--statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact the statements are directed at the nominal superiors." *(Pickering v. Board of Education 391 US 574). Garrison v. Louisiana,* 379 U.S. 64 (1964), *Wood v. Georgia, 370 U.S. 375 (1962).*

Furthermore, the Court of Appeals granted greater significance to the interest of the City of Baton Rouge DPW to limit the petitioner's speech although the DPW did not show with adequate evidence that the alleged distribution of the letter interfered with the regular operation of the DPW.

Certainly the interests of government as employer must be balanced against the interests of the employee, particularly when there may be predictions of harm used to justify the restriction of speech. However, deferring to the government in all matters in "direct connection to present or past employment" severely restricts protected speech and contravenes our long-held commitment to Freedom of Speech and Association.

This is an opportunity for this Court to clarify the *Pickering Guidelines* for the lower courts and bring this case in accordance with *Connick v. Meyers,* 461 U.S. 138, 103 S. Ct. 1684 (1983), *Moore v. City of Kilgore, 877* F.2d 364 (1989), *Waters v. Churchill,* 114 S.Ct. 1878 (1994), and the entire history of decisions involving protected speech by government employees. In light of this fundamental confusion in a First Amendment issue, this Court has an opportunity to offer guidance to the millions of government employees across the country who may wish to address legitimate matters of public concern within their own departments or expertise but cannot address them for fear of unrestricted retaliation.

2. The Louisiana Court of Appeal, First Circuit, had failed to review the important facts of the case as follows [because the Supreme Court of Louisiana did not issue any commentary with its opinion, we must rely on the reasoning of the lower court.]:

i) The petitioner was verbally instructed "not to send copies to the persons listed on the correspondence." (Dismissal letter, p. 23, par. 1) . He was accused of disobeying this verbal instruction by the then DPW director, Bill Howe, because "several of the copies have been received by the persons outside of Public Works".(Dismissal letter, p.23-24).

The persons outside the Public Works listed on the correspondence to receive the copies of the petitioner's June 27, 1988 letter were the Mayor, two Councilmen and the Council Administrator (Petitioner's June 27, 1988 letter, p.22). The evidences in record have shown that nobody outside the DPW including the Mayor, two Councilmen, the Council Administrator ever received any copies of the letter (Letters from persons of concern, pp. 26-28). Furthermore, the DPW introduced no evidence, whatsoever, that anybody outside the DPW had ever received the letter. Therefore, insubordination was not an issue for the petitioner's dismissal.

ii) The facts of case have disclosed that the petitioner's work enhanced the efficiency of DPW's public service. (Tr., Norman, dated October 25, 1988, pp. 30-32, Ex. Chatterjee 13, 42-51; Tr., Rivers Livous, pp. 100-104; Tr., Norman, dated October 27, 1988, p.25). The DPW of the City of Baton Rouge/ Parish of East Baton Rouge hired the petitioner in September, 1981. He started to work in the classified service as Engineer-in-Training for the Wastewater Division. At the time of his discharge, he had attained, after three promotions, the category of Professional Engineer III (P.E. III). For the first five years of service, from 1981 through 1985, his annual performance ratings were "Very Good" and he had received five merit increases and once he was promoted to Wastewater Divisional Manager for about a year. In 1986 and 1987, the petitioner received "Average" ratings for his annual job performance, because of the two projects in which the petitioner was involved while he was working in the Engineering Division. The petitioner's rating for the period ending June 30, 1988, was unsatisfactory, because the decision had already been made to discharge him from his job for the alleged insubordination. However, the City-Parish Personnel Board overruled the disciplinary action on the incompetence

of the petitioner. The DPW has not shown by a preponderance of evidence that the petitioner would have been discharged if he had not written his June 27, 1988 letter. Therefore, poor job performance was not an issue for the petitioner's dismissal.

iii) The petitioner's June 27, 1988 letter at page 22, which contained a request to the DPW Director, Bill Howe for a thorough investigation into mistakes made by DPW employees. The City-Parish did not produce any evidence, whatsoever, that the petitioner's earnest request had impaired the effective and efficient operation of the Public service in which the petitioner was engaged. In fact, if the mistakes pointed out had been rectified as requested, public service would have improved significantly. Whatever real or imaginary disagreements or ill-feeling arose between the petitioner and his supervisors, there was no showing of any results detrimental or prejudicial to the efficiency of the public service because of this letter. Therefore, petitioner's letter never disrupted the public services where the petitioner had worked..

iv) In its judgment, on Freedom of Speech issue, the Court of Appeal, First Circuit stated

> "The appellees do not contest the fact that Dr. Chatterjee's letter addressed a matter of 'public concern.' However, as they correctly point out, Dr. Chatterjee's letter also addressed a matter that had a direct connection with his own employment, a sewer project in which he had worked."

The Court concluded:

"Because we find the restriction on Dr. Chatterjee did

not violate his First Amendment rights under Pickering guidelines, there is no merit to this assignment of errors." App. 16a-17a.

At the time of the alleged insubordination (July 8, 1988), the sewer project on which the petitioner had worked, clearly was not "directly connected to his employment." The petitioner's letter in question was dated as June 27, 1988 (pp. 20-22 of this petition) and the Howe's directive regarding "not to send this letter" came to the petitioner on June 27, 1988, afternoon. On July 8, 1988, Mr. Howe dismissed the petitioner for allegedly distributing the letter outside the department (pp. 23-25 of this petition). At this time the petitioner's direct supervisor was Mr. Harold Norman, the Wastewater Manager. The petitioner had been transferred to the Wasterwater Division from Engineering Division, where the sewerage problems in question arose, on September 23, 1987 (Ex. Chatterjee # 12). The two projects were completed while the petitioner was working in the Engineering Division. After nearly a year in the new division, the petitioner wrote the letter dated June 27, 1988. Therefore, the matter(s) of the letter had no connection to his present employment nor his present supervisor. In fact, Harold Norman's name or anything else, was not mentioned explicitly or implicitly anywhere in the June 27, 1988, letter. Only two names were indicated on the letter; that of Mr. Joe Richard, the petitioner's past supervisor in the Engineering Division, and the Stedmark Construction Co., the contractor of the sewer project in question. The letter was in no way directly connected to the petitioner's present employment. In fact, Mr. Howe complained about the petitioner's independent attempts to investigate of the sewer problem, because the petitioner, at that time, was no longer working with the Engineering Division (Tr., Howe, pp. 98-99, 170-171). This previous argument was included in the

plaintiff's Reply Brief submitted to the 19th Judicial District Court as well as in the "Support Brief" submitted to Louisiana Court of Appeal, First Circuit.

v) Finally, the DPW has proven by the preponderance of evidence (Tr., Howe, pp. 97, 101-102, 124-125, 127-129), that it was motivated in its action by a reasonable expectation that the petitioner's June 27, 1988 letter would cause the disruption of the effective and efficient operation of the public service. Therefore, the petitioner's June 27, 1988, letter --in effect, a whistleblowing letter -- itself was a substantial motivating factor in his dismissal.

Under the 14th Amendment, employees as citizens can not be denied due process simply because they are employed by the government. In the case of a classified employee, he must receive advance notice of a pretermination hearing which is required and guaranteed by law before his termination. The respondents did not follow the minimum of hearings as required by Title 5, Section 554, 701 et seq of the Administrative Procedure Act, 1946. However, the lower courts did not recognize that the DPW deprived the petitioner of property without due process of law. A verbal notice 'not to return to work the next day' on the 8th July meeting (App. 18a) does not constitute a pre-termination hearing for an seven year permanent civil service employee. Additionally, notifying of two-weeks-suspension and subsequent dismissal in the same letter (page 25 of this petition) did not give the petitioner an opportunity, meaningful or otherwise, to defend him against the alleged charges. Where the 'life, liberty or property' of an individual is liable to be affected by the decision of an administrative authority, the 'Due Process' clause of the 14th Amendment is attracted guaranteeing the minimal requirement of 'fair hearing'. Where an administrative agency

or tribunal denies 'fair hearing' in contradiction of guarantee of 'due process', the courts are bound to interfere *(Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio* (1937) 301 U.S. 292) irrespective of any other consideration.

In terms of Constitutional guarantee, the standard of hearing may be raised by statutory requirements, but no statute can reduce the minimal requirement of any type of hearing, including 'fair hearing' (ibid). There is a minimum below which it ceases to be "fair". It means an opportunity "to present one's case and be heard in its support."

The lower courts sided with the respondents although they did not follow the minimum of hearings in the following facts:

- In the petitioner's case , there was no date of hearing set for his subsequent suspension and dismissal .

- Far from conducting a pretermination hearing, Mr. Howe did not even confront the petitioner with the memo in question and give him an opportunity to defend himself. Based on wrong assumptions and no investigation, the petitioner was suspended and subsequently discharged on July 8, 1988. If he had investigated further, he would have discovered that none of the people listed as receipts of the letter ever received the letter, as alleged. (Letters, pp. 26-28 of this petition).

- The petitioner received no advanced notice or warning of the possible dismissal before his termination. Therefore, the petitioner never received a fair hearing before he was dismissed from his employment.

- The decision of suspension and subsequent dismissal of the petitioner was made before the so-called pre-termination hearing on the 8th July meeting. (Decision of Louisiana Court of Appeal, First Circuit, under Assignment of Error Number 3, App. 18a).

Furthermore, additional breaches of due process occurred during this case. The record here shows that in the Personnel Board proceedings, both issues, freedom of speech and due process of law were raised (Tr., Chatterjee, dated October 3, 1989). This testimony was recorded onto audio tapes made by the City-Parish Personnel Board but was never transcribed for court records, as required by law. However, all the other testimony was transcribed. As a result, the District and First Circuit Courts never read the petitioner's entire testimony, thus giving the petitioner an unfair hearing and certainly giving the City-Parish undue advantage. Only when the First Circuit Court judges made an erroneous statement,

> "there is nothing in the record for us to consider regarding this issue because Dr. Chatterjee did not raise the issue at the hearing before Board." (Decision of Court of Appeal, First Circuit, under Assignment of Error Number 3, App. 17a).

was it realized that the petitioner's entire testimony was not there in the court record. This omission was verified by the employee of the Clerk of Court of the 19th Judicial District Court. (Page 29 of this petition - Affidavit of Clerk of Court).

Therefore, judgment of the District Court was given without the review of the petitioner's testimony and the judges of the First Circuit Court made their decision without the petitioner's

testimony. A request for a rehearing (page 30 of this petition) which included the petitioner's "Support Brief" was denied. All the facts of the case including Freedom of Speech, Due Process of Law issues and aforesaid omissions were presented for review to the Supreme Court of Louisiana State , but the judges of the Court denied the writ of certiorari.

By seeking certiorari , the petitioner seeks vindication of the accepted legal constitutional principles from which the courts of concern so clearly departed, thereby unjustifiably interfering in a most significant constitutional rights.

****

CONCLUSION

The petition for Certiorari should be granted.

Respectfully submitted,

K. Chatterjee

Karunamoy Chatterjee
Plaintiff/Petitioner
50-B Arcadia Road
Hackensack, NJ: 07601
January , 1996 .

PETITIONER'S JUNE 27, 1988 LETTER

Official Seal

CITY-PARISH DEPARTMENTAL MEMORANDUM

Date: June 27, 1988

To: Mr. William Howe, DPW Director
From: Dr. K. Chatterjee
Subject: Sunshine Sewer Project No. 87-SR-CP-0029

The main sewer line of the subject project is 8 inch and I wrote the SPECIFICATIONS accordingly. In July-August, 1087, the defect was fixed as 10 inch sewer line incorrectly by Stedmark Construction Co. I was forced to sign up the Change Work Order as 10 inch main sewer line and the Chief Engineer approved it accordingly. Afterwards, I was insulted professionally and reprimanded seriously. This incident was related to my "Average" rating in 1987.

On July 28, 1987, I sent you a memorandum stating the mistakes that had been done by fixing this sewer line as 10 inch. I reminded you once more of the Sunshine Sewer Project in the memorandum dated September 23, 1987. This memorandum also, contained my strong protest against the blame, untrue statements made by Mr. Joe Richard, the Chief Engineer, about me regarding the 75th Street Sewer Project and his (Richard's) sending memo to an outside agency. This project was also, related to my "Unsatisfactory" rating in 1986. No action about the said project was taken at that time, or even as of this date.

Very recently, I began to collect more sold evidence to support my claim. The actual cost for this project was more than $5,000. In the future, to fix this incorrectly installed sewer line, it will cost at least another five/six thousand dollars - totalling more than $10,000 for a simple sewer point repair.

As one of residents and taxpayers of the East Baton Rouge Parish, this wastage of money is extremely insulting to me. This example should never be considered as an isolated incident. For fixing hundreds of cave-in, millions of dollars are expensed by the Department of Public Works. There is no doubts (evident from the present example) that a significant amount of hard-earned public money is being wasted similarly. The wastage gap is being filled up by increasing our "Sewer Fees" very frequently.

Therefore, it is earnestly requested that a thorough and impartial investigation and subsequent actions be made as soon as possible in order to stop this kind of blatant waste of PUBLIC FUNDS in the future.

I am ready to provide all evidence to support my claim. As a most concerned taxpayer and resident of the East Baton Rouge Parish, I request your reply with your Plan of Action in this matter at the earliest possible convenience.

Since I was involved in this project and under these circumstances, I expect to be promptly informed by the thorough investigative reports that I am sure you intend to write.

It is to be noted that the Stedmark Construction Co. is fully responsible under <u>one year warranty</u> to fix the subject project properly at its own cost. STILL THERE IS TIME LEFT FOR

THIS !!

Sincerely yours,

"s/K. Chatterjee"

CC: Mr. Pat Screen -Honorable Mayor-President
Mr. Donald Nijoka - Council Administrator
Mr. Ben Meyer - Assistant Director
Mr. Harold Norman - Wastewater Manager
Mr. Joe Richard -Chief Engineer
Mr. Horace Elkins - Business Manager
Mr. Jim Llorence - Personnel Administrator
Mr. David Braud - Council Member - District 3
Mr. Michael G. Roubique - Council Member: District 9

DISMISSAL LETTER DATED JULY 8, 1988

Official Seal

Department of Public Works
City of Baton Rouge
Parish of East Baton Rouge
Post Office Box 1471
Baton Rouge, Louisiana
70821

July 8, 1988

CERTIFIED - RETURN RECEIPT REQUESTED

Mr. Karunamoy Chatterjee
1047 Bullrush Drive
Baton Rouge, Louisiana 70810

Dear Mr. Chatterjee :

On June 27, 1988, you, Harold Norman and myself had a meeting to discuss a memorandum to me concerning the Sunshine Sewer Project (project number 87-SR-CP-0029). You provided me a copy of the memorandum, and I stated that I would have the matter fully researched. I also instructed you not to send copies to the persons listed on the correspondence. My thinking was and is that the issues raised by you involve technical judgement by those trained and experienced in the engineering field and that this department's administration deserved an opportunity to respond to your accusations before they were raised with individuals outside of this department.

Apparently you decided not to heed my instruction, since several of the copies have been received by the persons outside

of Public Works. If you would have waited for a response, you would have had an opportunity to correct some erroneous statements in your correspondence. Apparently you are more interested in creating controversy, than receiving and evaluating a response.

Attached you will find a memorandum from the Chief Engineer, Mr. Joe G. Richard, Jr., which explains his findings. As Director of Public Works, I am a licensed Civil Engineer and have personally reviewed this matter. It is my opinion, based on the information received, that this project has been completed properly. No additional repair costs are anticipated, and there certainly will not be any additional costs which can be attributable to an incorrect installation of the sewer line. Yes, the project did cost more than $5,000. However, this was caused when a change order was necessary, apparently due to an error in the Scope and Technical Specifications which was assigned to you for completion. The cost of the change order was $98.52 which brought the total costs of the project to $5,063.52. This original project cost was determined through the bid process and the total project cost, including the change order, is in compliance with applicable purchasing laws.

You have received an "average" service rating for the rating periods ending June 30, 1986 and June 30, 1987. Inquiries to your present supervisor, Mr. Harold Norman, indicates that you require assistance or very detailed instructions to complete assigned projects. There also have been accusations highly critical of Mr. Norman. You apparently have made personal accusations against Mr. Norman and apparently often have threatened Mr. Norman with personal grievances and law suits. After reading your June 6, 1988 memorandum to Mr. Norman, it is apparent that you are unwilling to accept job assignments without questioning or opposing Mr. Norman's authority.

Over the last two and one-half years, there have been numerous appeal hearings lasting for hours, and numerous memorandums from you resulting in written responses to you from me and your immediate supervisors. None of the hearings or responses to you seem to change or improve your work attitude or productivity. Now it appears, you have decided to send accusations outside of this department without technical merit in an attempt to create controversy for the apparent purpose of harming others and improving your work situation. These actions on your part when considered with your work record, have led me to conclude that this situation should not be allowed to continue.

Therefore, because you disobeyed a direct order and because of your poor work record, you are hereby suspended for a period of two weeks beginning Monday, July 11, 1988 through Friday, July 22, 1988, and dismissed effective at the close of business Friday, July 22, 1988.

This suspension and dismissal is in accordance with Rule X, Section 1, of the Rules Governing Employees in the Classified Service of the City of Baton Rouge and Parish of East Baton Rouge.

Very truly yours,
"s/William E. Howe"
Director

WEH/HE/lb
cc: Mr. J. Ben Meyer, Jr., Assistant Director of Public Works
Mr. Harold Norman, Wastewater Manager
Mr. Joseph Richard, Jr., Chief Engineer
Mr. Horace Elkins, Public Works Business Manager
Mr. James L. Llorens, Personnel Administrator

COUNCIL ADMINISTRATOR'S LETTER

Official Seal

Office of the Council Administrator

City of Baton Rouge
Parish of East Baton Rouge

DONALD NIJOKA
Council Administrator

222 St. Louis Street
Post Office Box 1471
Baton Rouge, Louisiana
70821

ELEANOR McCONN
Asst. Council Administrator

504/389-3123

July 18, 1988

TO: DR. K. CHATTERJEE
FROM: DONALD NIJOKA - COUNCIL ADMINISTRATOR

This is to advise that I did not receive a copy of a letter dated June 27, 1988 to Mr. William Howe relative to the Sunshine Sewer Project.

Should you have any further questions, please let me know.

"s/DONALD NIJOKA"
Council Administrator

COUNCILMAN DAVID BRAUD'S LETTER

Official Seal

Office of the Metropolitan Council

City of Baton Rouge
Parish of East Baton Rouge

Post Office Box 1471
Baton Rouge, Louisiana
70821

July 18, 1988

TO: DR. K. CHATTERJEE
FROM: COUNCILMAN DAVID BRAUD, DISTRICT 3

This is to advise that I did not receive a copy of a letter dated June 27, 1988 to Mr. William Howe relative to the Sunshine Sewer Project.

Should you have any further questions, please let me know.

"s/David Braud"
Councilman David Braud

COUNCIL MEMBER'S LETTER

Official Seal

Office of the Metropolitan Council

City of Baton Rouge
Parish of East Baton Rouge

Post Office Box 1471
Baton Rouge, Louisiana
70821

July 20, 1988

TO WHOM IT MAY CONCERN:

This is to advise that as secretary to Councilman Mike Roubique a letter dated June 27, 1988, from Dr. K. Chatterjee to Mr. William Howe relative to the Sunshine Sewer Project was not received by the Councilman Mike Roubique in his mail.

"s/Pat Elam"
Pat Elam, Secretary
to Mike Roubique

COURT OF APPEAL, FIRST CIRCUIT
DOCKET NO. 94 C 1025
DR. KARUNAMOY CHATTERJEE, Appellant
VERSUS
CITY OF BATON ROUGE, ET AL., Appellees

****

AFFIDAVIT

STATE OF LOUISIANA)
PARISH OF EAST BATON ROUGE)

The following is based on my personal knowledge of which I competent to testify:

I am an employee with the Clerk of Court, 19th Judicial District Court. I handle the processing records from this court to the First Circuit of Appeals. I received a call from Jackie, an employee of the First Circuit, inquiring about the transcript of the appellant in the case of Dr. Karunamoy Chatterjee versus City of Baton Rouge, et al, No. 94 CA 1025.

I was unsuccessful in location the transcript at the offices of Judge Hester or Assistant City-Parish Attorney Dawn Guillot. Appellant's counsel, Dan Scheuermann, indicated he would contact his client. A few days later he brought the audio tapes. I then called the First Circuit and was told to hold off and not send the audio tapes.

I am familiar with the processing of appeals to the 19th Judicial District Court from administrative bodies such as the City-Parish Personnel Board. I assume that all records I receive for administrative boards and commissions are true copies of the hearing in question.

"s/MORGY BORSKY"

SWORN TO SUBSCRIBED before me, this 20th day of April, 1995.

"s/Not legible"
NOTARY PUBLIC

COURT OF APPEAL, FIRST CIRCUIT
DOCKET NO. 94 C 1025
DR. KARUNAMOY CHATTERJEE, Appellant
VERSUS
CITY OF BATON ROUGE, ET AL., Appellees

****

APPLICATION OF REHEARING

In accordance with Uniform Rule 2-18.1 Appellant Dr. Karunamoy Chatterjee hereby submits an application for rehearing in the above-captioned matter. The first reason this Court should grant rehearing is that the City-Parish Personnel Board did not prepare a transcript of the appellant's testimony as required by law. Thus neither this court nor the District was able to review the testimony of Dr. Chatterjee. In its "Oral Reasons for Judgment," the District Court states, "All I can go upon is the record. This is an appeal, and the finding of the Boars is affirmed." The second reason is that many statements in the Court's decision are erroneous.

Respectfully submitted by:
"s/DAN M. SCHEUERMANN"
Bar Roll Number 11767
Attorney-at-Law
405 St. Ferdinand Street
Baton Rouge, LA 70802
504/387-1221

CERTIFICATE

I certify that a copy of the foregoing was this day mailed, postage prepaid, to counsel of record.
Baton Rouge, Louisiana, this 21 st day of April, 1995.

"s/DAN M. SCHEUERMANN"

DR. KARUNAMOY CHATTERJEE DOCKET NO. 357

VERSUS AUG. 4, 1988 @9:30 A.M.

DEPARTMENT OF PUBLIC WORKS [1]

This is an appeal taken by Dr. Karunamoy Chatterjee pursuant to the Rules Governing Employees In the Classified Service of the City of Baton Rouge and Parish of East Baton Rouge.[2] Dr. Chatterjee was suspended and discharged from service on July 8, 1988, by the authority of William Howe, the then Director of the Department of Public Works (DPW) for the City and Parish of East Baton Rouge. The grounds for disciplinary action and ultimate discharge, as stated in the Director's letter of July 8th, were (1) insubordination and (2) incompetence. Under the rules governing the Personnel Board, our review is limited to the two grounds stated[3] by the appointing authority.

INSUBORDINATION: In mid-1987, Chatterjee was assigned the task of preparing specifications for bidding on the "point repair" of a sewer line on Sunshine Road. In his specifications Chatterjee detailed the lines as 8". The contract was awarded to the low bidder for the sum of $4, 965.00.

---

1. Upon the recusation of Dan Moller and Henry Batiste, the City Parish Council appointed Lewis S. Doherty and C. Lenton Sartain Ad Hoc members to the Personnel Board.
2. Rule X, Section 3 and Rule XI, Section 1.
3. Rule X1, Section 1.3.

When the line was excavated, it was then determined that the line was 10" and a change order was effected for the additional sum of $98.52, representing the extra cost of a collection pipe and service tee. Chatterjee addressed a memorandum (July 28, 1987) to the Director asserting that his independent investigation of the matter reaffirmed his original specification that the line was 8" and that "The decision for a Change Work Order was a mistake and a blatant waste of Public Funds."

Still convinced of his position and that the 8" versus 10" line resulted in his unwarranted efficiency rating of "Average" for the year 1987, Chatterjee prepared an undated memorandum to the Director and, on June 23, 1988 (Thursday), gave a copy to Ms. Pat Elam, Aide to Mayor Pro-Temp Mike Roubique (Councilman from Chatterjee's district), and asked her to hold the memo until he could recheck the dimensions of the pipe.

The memo, in pertinent part, states:

> Very recently, I began to collect more evidence to support my claim. The actual cost for this project was more than $5,000. In the future, to fix this incorrectly installed sewer line, it will cost at least another five/six thousand dollars - Totaling (sic) more than $10, 000 for a simple point repair.
>
> As one of the residents and taxpayers of the East Baton Rouge, this wastage of money is extremely insulting to me.
>
> Therefore, it is earnestly requested that a thorough and impartial investigation and subsequent actions be made as soon as possible, in order to stop this kind of blatant

waste of PUBLIC FUNDS in the future.

Between June 23 (Thursday) and mid-day June 27 (Monday), Chatterjee checked the line and again concluded that it was 8". He called Ms. Elam which authorized her to disclose to Mr. Roubique his memo of the 23rd. During the same interval, he revised his draft, changing the second paragraph noted above, to read as follows:

> As one of the residents and taxpayers of the East Baton Rouge Parish, this wastage of money is extremely insulting to me. This example should never be considered as an isolated incident. For fixing hundreds of cave-in, millions of dollars are expensed by the Department of Public Works. There is no doubts (evident from the present example) that a significant amount of hard-earned public money is being wasted similarly. The wastage gap is being filled up by increasing our "Sewer Fees" very frequently.

Shortly before noon on the 27th, Chatterjee showed a copy of his revised draft to his supervisor, who in turn brought the same to the attention of the Director. That afternoon, a conference was held between Chatterjee, Howe (Director), and Norman (the former's supervisor). He was told by Howe that the charges contained in the memo were very serious and that he (Howe) would have the matter investigated, that Chatterjee was not to send copies to persons indicated on the memo. Chatterjee was specifically asked if he had forwarded copies to anyone outside of the department and he answered in the negative. Neither Howe nor Norman knew of the draft sent to Ms. Elam on the 23rd. At the hearing, when asked why he didn't tell Howe or Norman about the previous draft, Chatterjee stated, he didn't "think it was important."

On June 30th (Thursday), not knowing of the 27th meeting, or of the directive given to Chatterjee by Howe, Ms. Elam forwarded a copy of Chatterjee's draft to Howe with a note, the concluding paragraph of which stated:

> I told him that I would ask that you very carefully look at what he has to (sic) say. I told him that you were a very fair person and felt you would hear him out.

Copies of the June 27th memo were sent to Horace Elkins, DPW Business Manager, and to Mr. James L. Llorens, Personnel Administrator for the City Parish.

The Director's letter of dismissal, dated July 8, 1988, followed.

The director did in fact have the matter immediately investigated and result was that the line was 10".

While the testimony is conflicting, we find that the more creditable and convincing evidence is to the effect that the line is 10" at the point of repair location.

Considering Chatterjee's serious charges of fraud, mismanagement, and waste within DPW, we find the Director's orders to Chatterjee to withhold distribution of his memo until he (Director) could have the matter investigated to be a reasonable one.

Chatterjee contends that he did not disobey the Director's order because he had given his memo to Ms. Elam prior to the order. He also contends that Elkins is an employee of the Department and that Llorens is custodian of DPW's personnel files and that transmission of his memo to them was

not "outside" the department and not in violation of the order.

We do not have to address the issue of whether Elkins and Llorens are to be considered within the department because, for reasons hereinafter stated, we are satisfied that the memo to Ms. Elam and Chatterjee's subsequent conduct constituted a breach of the Director's order.

Ms. Elam held the memo at Chatterjee's request until he called her. She did not disclose its existence until three days later, or three days after the order. Chatterjee did nothing. A simple call to Ms. Elam would have returned his memo to him, thus negating the chain of events that followed. Or, just advising the Director that he had given Ms. Elam the memo would have sufficed. The memo to Ms. Elam and the revised draft of the 27th June were practically identical. To say that he had not disclosed the contents of latter memo to outside parties is not truthful. In this denial, he directly violated the order of his Department Head and was indeed insubordinate in this respect.

INCOMPETENCY: Dr. Chatterjee was hired by DPW in September 1981, in the classified service as Professional 1 and, at the time of his discharge, had attained the category of Professional Engineer III. For the first five years of service his annual performance was given as "Very Good"; however, in 1885, he was rated as "Unsatisfactory" which was changed to "Average" after appeal and review. In 1986 and 1987, his rating was "Average"; however, at the time of his discharge, his rating was assessed as "Unsatisfactory".

The testimony elicited from his supervisors reflects that they were displeased with his job performance and seriously question his competence and ability to perform the tasks to

which he was assigned and those normally performed by persons of his job ratings. Subordinate employees who worked with and for him found him to be knowledgeable and capable of performing his duties. The 1988 "Unsatisfactory" rating for the period 6/30/87 to 7/8/89 was simultaneous with his discharge. Considering the testimony for or against the competency issue, we conclude that DPW has not borne its burden of proof and disciplinary action on this cause is overruled.

Accordingly, for the above reasons, the dismissal of Dr. Chatterjee on the grounds of insubordination is upheld.

Baton Rouge, Louisiana, this 19th day of October, 1989.

"s/Not legible"
Lewis S. Doherty III, Chairman
Ad Hoc Member

"s/Rita Williams"
Member

"s/C. Lenton Sartain"
Ad Hoc Member

DR. KARUNAMOY CHATTERJEE
VS.
CITY OF BATON ROUGE, ET AL.

NUMBER 345, 670 , DIV. "C"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

ORAL REASONS FOR JUDGMENT

MONDAY, SEPTEMBER 20, 1993

THE HONORABLE BOB H. HESTER, JUDGE PRESIDING

BY THE COURT:

ALL I CAN GO UPON IS THE RECORD. THIS IS AN APPEAL, AND THE FINDING OF THE BOARD IS AFFIRMED.

****

FILED FEB 1 1994

"s/Not legible"
DY. CLERK OF COURT

19th JUDICIAL DISTRICT COURT

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 94 CA 1025

****

DR. KARUNAMOY CHATTERJEE

VERSUS

CITY OF BATON ROUGE, ET AL.

Judgment rendered April 7, 1995

****

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 345, 670
Honorable Robert H. Hester, Judge

****

Dan Scheuermann Baton Rouge, LA	Attorney for Plaintiff-Appellant Dr. Karunamoy Chatterjee
Dawn Guillot Baton Rouge, LA	Attorney for Defendant-Appellee City of Baton Rouge EBRP Personnel Board

****

Before: WATKINS, FOGG, AND TANNER, [1] JJ.

---

1 Judge Thomas W. Tanner, retired, is serving as judge Pro Tempore by special appointment of the Louisiana Supreme Court.

WATKINS, J.

Dr. Karunamoy Chatterjee, formerly employed as a Professional Engineer III with the City of Baton Rouge/Parish of East Baton Rouge Department of Public Works (DPW), appeals from a district court judgment affirming a decision of the City-Parish Personnel Board (Board) that upheld termination of his civil service employment for insubordination. The facts are accurately stated in the decision of the Board rendered October 19, 1989, which we quote in pertinent part, as follows:

This is an appeal taken by Dr. Karunamoy Chatterjee pursuant to the Rules Governing Employees In the Classified Service of the City of Baton Rouge and Parish of East Baton Rouge. Dr. Chatterjee was suspended and discharged from service on July 8, 1988, by the authority of William Howe, the then Director of the Department of Public Works (DPW) for the City and Parish of East Baton Rouge. The grounds for disciplinary action and ultimate discharge, as stated in the Director's letter of July 8th, were (1) insubordination and (2) incompetence. Under the rules governing the Personnel Board, our review is limited to the two grounds stated [3] by the appointing authority.

INSUBORDINATION: In mid-1987, Chatterjee was assigned the task of preparing specifications for bidding on the "point repair" of a sewer line on Sunshine Road. In his specifications Chatterjee detailed the lines as 8". The contract was awarded to the low bidder for the sum of $4, 965.00. When the line was excavated, it was then determined that the line was 10" and a change order was effected for the additional sum of $98.52, representing the extra cost of a collection pipe and service tee. Chatterjee addressed a memorandum (July 28,

1987) to the Director asserting that his independent investigation of the matter reaffirmed his original specification that the line was 8" and that "The decision for a Change Work Order was a mistake and a blatant waste of Public Funds."

Still convinced of his position and that the 8" versus 10" line resulted in his unwarranted efficiency rating of "Average" for the year 1987, Chatterjee prepared an undated memorandum to the Director and, on June 23, 1988 (Thursday), gave a copy to Ms. Pat Elam, Aide to Mayor Pro-Temp Mike Roubique (Councilman from Chatterjee's district), and asked her to hold the memo until he could recheck the dimensions of the pipe.

The memo, in pertinent part, states:

> Very recently, I began to collect more evidence to support my claim. The actual cost for this project was more than $5,000. In the future, to fix this incorrectly installed sewer line, it will cost at least another five/six thousand dollars - Totaling (sic) more than $10, 000 for a simple point repair.
>
> As one of the residents and taxpayers of the East Baton Rouge, this wastage of money is extremely insulting to me.
>
> Therefore, it is earnestly requested that a thorough and impartial investigation and subsequent actions be made as soon as possible, in order to stop this kind of blatant waste of PUBLIC FUNDS in the future.

Between June 23 (Thursday) and mid-day June 27 (Monday), Chatterjee checked the line and again concluded

that it was 8". He called Ms. Elam which authorized her to disclose to Mr. Roubique his memo of the 23rd. During the same interval, he revised his draft, changing the second paragraph noted above, to read as follows:

> As one of the residents and taxpayers of the East Baton Rouge Parish, this wastage of money is extremely insulting to me. This example should never be considered as an isolated incident. For fixing hundreds of cave-in, millions of dollars are expensed by the Department of Public Works. There is no doubts (evident from the present example) that a significant amount of hard-earned public money is being wasted similarly. The wastage gap is being filled up by increasing our "Sewer Fees" very frequently.

Shortly before noon on the 27th, Chatterjee showed a copy of his revised draft to his supervisor, who in turn brought the same to the attention of the Director. That afternoon, a conference was held between Chatterjee, Howe (Director), and Norman (the former's supervisor). He was told by Howe that the charges contained in the memo were very serious and that he (Howe) would have the matter investigated, that Chatterjee was not to send copies to persons indicated on the memo. Chatterjee was specifically asked if he had forwarded copies to anyone outside of the department and he answered in the negative. Neither Howe nor Norman knew of the draft sent to Ms. Elam on the 23rd. At the hearing, when asked why he didn't tell Howe or Norman about the previous draft, Chatterjee stated, he didn't "think it was important."

On June 30th (Thursday), not knowing of the 27th meeting, or of the directive given to Chatterjee by Howe, Ms. Elam forwarded a copy of Chatterjee's draft to Howe with a

note, the concluding paragraph of which stated:

> I told him that I would ask that you very carefully look at what he has to (sic) say. I told him that you were a very fair person and felt you would hear him out.

Copies of the June 27th memo were sent to Horace Elkins, DPW Business Manager, and to Mr. James L. Llorens, Personnel Administrator for the City Parish.

The Director's letter of dismissal, dated July 8, 1988, followed.

The director did in fact have the matter immediately investigated and result was that the line was 10".

While the testimony is conflicting, we find that the more creditable and convincing evidence is to the effect that the line is 10" at the point of repair location.

Considering Chatterjee's serious charges of fraud, mismanagement, and waste within DPW, we find the Director's orders to Chatterjee to withhold distribution of his memo until he (Director) could have the matter investigated to be a reasonable one.

Chatterjee contends that he did not disobey the Director's order because he had given his memo to Ms. Elam prior to the order. He also contends that Elkins is an employee of the Department and that Llorens is custodian of DPW's personnel files and that transmission of his memo to them was not "outside" the department and not in violation of the order.

We do not have to address the issue of whether Elkins

and Llorens are to be considered within the department because, for reasons hereinafter stated, we are satisfied that the memo to Ms. Elam and Chatterjee's subsequent conduct constituted a breach of the Director's order.

Ms. Elam held the memo at Chatterjee's request until he called her. She did not disclose its existence until three days later, or three days after the order. Chatterjee did nothing. A simple call to Ms. Elam would have returned his memo to him, thus negating the chain of events that followed. Or, just advising the Director that he had given Ms. Elam the memo would have sufficed. The memo to Ms. Elam and the revised draft of the 27th June were practically identical. To say that he had not disclosed the contents of latter memo to outside parties is not truthful. In this denial, he directly violated the order of his Department Head and was indeed insubordinate in this respect.

INCOMPETENCY: Dr. Chatterjee was hired by DPW in September 1981, in the classified service as Professional 1 and, at the time of his discharge, had attained the category of Professional Engineer III. For the first five years of service his annual performance was given as "Very Good"; however, in 1885, he was rated as "Unsatisfactory" which was changed to "Average" after appeal and review. In 1986 and 1987, his rating was "Average"; however, at the time of his discharge, his rating was assessed as "Unsatisfactory".

The testimony elicited from his supervisors reflects that they were displeased with his job performance and seriously question his competence and ability to perform the tasks to which he was assigned and those normally performed by persons of his job ratings. Subordinate employees who worked with and for him found him to be knowledgeable and capable

of performing his duties. The 1988 "Unsatisfactory" rating for the period 6/30/87 to 7/8/89 was simultaneous with his discharge. Considering the testimony for or against the competency issue, we conclude that DPW has not borne its burden of proof and disciplinary action on this cause is overruled.
[Footnote omitted.]

Although we find no error in the decision of the Board, we will address the several assignments of error asserted by appellant.

Assignment of Error No. 1 "The District Court's refusal to reverse and remand the decision of the City-Parish Personnel Board was erroneous because the decision was arbitrary, capricious and constitutes an abuse of the Board's discretion."

From its written decision, it is clear that the board found the testimony of the City-Parish witnesses more credible than Dr. Chatterjee's testimony. The Board acknowledged that the testimony was conflicting, but made its conclusion that Dr. Chatterjee's action amounted to insubordination after weighing all the evidence. The "inaccuracies" in the written decision alleged by appellant in his brief to this court are in reality no more than questionable semantics of several statements taken out of context. The alleged inaccuracies do not show arbitrary and capricious conclusions reached by the Board, nor an abuse of its discretion.

"[T]he decision of the Board may not be overturned absent a finding that it is either not supported by substantial and competent evidence or it is arbitrary, capricious and an abuse of discretion." James v. City of Baton Rouge, 489 So.2d

1308, 1310 (La. App. 1st Cir. 1986). The word "arbitrary" implies a disregard of evidence or a disregard of the proper weight of the evidence ; a conclusion is "capricious" when there is no substantial evidence to support it or when the conclusion is contrary to substantiated, competent evidence. Coliseum Square Association v. City of New Orleans, 544 So.2d 351 (La. 1989). An abuse of discretion results from a conclusion reached capriciously or in an arbitrary manner. Torrance v. Caddo Parish Police Jury, 119 So.2d 617 (La. App. 2d Cir. 1960). We find that the record does not reflect arbitrary or capricious action by the Board in concluding that Dr. Chatterjee was insubordinate and that his insubordination was cause for termination of his employment.

Furthermore, it is immaterial that because some of the members of the Board recused themselves, the ad hoc members did not hear all of the testimony firsthand. The appellant has not made a showing that the ad hoc members failed to adequately review the testimony previously adduced. [2]

Assignment of Error Number 2: "The District Court's refusal to reverse or remand the decision of the City-Parish Department of Public Works (DPW) denied Dr. Chatterjee his constitutional rights to freedom of speech and association."

Under certain circumstances a public servant may be discharged because of his speech, without violating his First

---

2. We also note the appellant bears the responsibility of designating the record on appeal, and if any portions thereof are lacking, he cannot complain about our failure to review those portions.

Amendment right to free speech. Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968). Pickering established guidelines by which infringement of First Amendment rights is determined in cases involving civil service employees. The Pickering court held that the interest of a state as an employer allows reasonable restriction upon speech when such limitation promotes efficiency in public service, maintains discipline, increases harmony among co-workers, and promotes loyalty and confidence in positions where such traits are of importance. However, Pickering also holds that the legitimate interests of individuals and the public require that public employees remain unrestricted from making public statements on matters of public concern, especially when the statements have no direct connection with his or her employment or duties and are not directed at a nominal superior. See Dumez v. Homa Municipal Fire & Police Civil Service Board, 365 So.2d 603 (La. App. 1st Cir. 1978).

The appellees do not contest the fact that Dr. Chatterjee's letter addressed a matter of "public concern." However, as they correctly point out, Dr. Chatterjee's letter also addressed a matter that had a direct connection with his own employment, a sewer project on which he had worked. The fact that a copy of the letter was directed to the City-Parish personnel administrator indicates that Dr. Chatterjee was aware the letter was directly related to his employment. Also, the thrust of the letter was against appellant's own supervisors in DPW.

The directive Mr. William Howe gave to Dr. Chatterjee, to postpone circulation of the letter until after an investigation, certainly did not prohibit him from ever sending the letter. Mr. Howe's directive was a reasonable restriction that tended to promote the efficiency of the DPW, to maintain

discipline, to increase harmony, and to promote loyalty and confidence.

Because we find the restriction on Dr. Chatterjee did not violate his First Amendment rights under the Pickering guidelines, there is no merit to this assignment of error.

We note that in his brief to this court on this issue and in the proceedings below, counsel for appellant cited and relied on an unpublished opinion of this court. Such action was a violation of the Uniform Rules of Louisiana Courts of Appeal, Rule 2-16.3. The Louisiana Supreme Court has admonished attorneys as follows: "Opinions marked 'Not Designated for Publication' should not be cited, quoted, or referred to by any counsel, or in any argument, brief, or other materials presented to any court, except in continuing or related litigation." Roberts v. Sewerage and Water Board, 92-2048 (La. 3/21/94); 634 So.2d 341, 349.

Assignment of Error Number 3: "The District Court's refusal to reverse or remand the decision of the City-Parish Personnel Board was erroneous because DPW deprived Dr. Chatterjee of his constitutional right to a pretermination hearing."

The appellees contend that the issue raised by this assignment of error is not properly before us on appeal ; that there is nothing in the record for us to consider regarding this issue because Dr. Chatterjee did not raise the issue at the hearing before the Board. However, it is unnecessary for us to decide whether Dr. Chatterjee waived his objection to this procedural defect by proceeding with the hearing before the Board without objecting. See Banks v. Department of Public Safety and Corrections, 598 So.2d 515, 521, n. 7 (La. App. 1st

Cir. 1992). Instead, we find that a meeting on July 8. 1988, of Dr. Chatterjee with Mr. Howe and Horace Elkins, the business manager, satisfied the due process requirements of a pre-termination hearing imposed by Cleveland Board of Education v. Loudermill , 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Not only has this court required adherence to Loudermill, [see Murray v. Department of Revenue and Taxation, 504 So.2d 561 (La. App. 1st Cir. 1986), writ denied, 504 So.2d 880, 882, 883 (La. 1987) ; 543 So.2d 1150 (La.App. 1st Cir. 1989)], but we have recognized that due process is :

> a flexible standard which requires such procedural safeguard as a particular situation demands. Since due process is not a technical concept with a fixed content unrelated to time, place and circumstances, precisely what process is due in a given case is dependent upon the peculiar facts involved.
> [Citation omitted.]

Brown v. Housing Authority of New Orleans, 590 So.2d 1258, 1260 (La. App. 1st Cir. 1991).

Under the circumstances of the instant case, we find the July 8th meeting, which appellant in his brief to the district court admitted attending, satisfied the due process rights appellant now asserts. Accordingly, we find no merit in this assignment of error.

Assignment of Error Number 4: "The District Court's refusal to reverse or remand the decision of the City-Parish Personnel Board was erroneous because the proceedings before the Board improperly placed the burden of proof on Dr. Chatterjee."

BEST AVAILABLE COPY

Appellant's argument on this assignment of error is a mere conclusory statement that the burden of proof was on Dr. Chatterjee, which the record does not support. Our review of the record reveals that DPW presented convincing proof of Dr. Chatterjee's violation of a direct order of his superior. The fact that Dr. Chatterjee's evidence did not refute the DPW's evidence does not mean that Dr. Chatterjee had the burden of proving that he was not insubordinate. Furthermore, even if we accept, for the sake of argument only, Dr. Chatterjee's contention that he did not violate the order because he had previously left the first draft of the letter with Ms. Elam, there is evidence that by so doing he violated a written department directive. Exhibit No. 35 in the record is a memorandum dated September 28, 1987, from Wastewater Manager Harold E. Norman to Dr. Chatterjee, concerning his assignment to the Wastewater section. The memorandum provides in pertinent part:

> 1. The Assistant Wastewater Manager will be your immediate supervisor . The Assistant Wastewater Manager along with myself, will provide you with your work assignment.
>
> ***
>
> 3. All correspondence from you should be addressed to me or prepared for my signature. This requirement is not intended to circumvent the appeal or grievance rights afforded you by the Rules Governing Employees in the Classified Services.
>
> ****
>
> 7. After assigned projects are completed, a written report should be prepared and submitted to me. The

report should include the assignment, a statement of the problem and recommendation or corrective action taken.

8. You are encouraged to submit in writing, to me or the Assistant Wastewater Manager, any ideas or proposals that you believe will improve Wastewater operations.

In light of the above written policy, it is clear that Dr. Chatterjee's circulation of the first draft of the letter to Ms. Elam was an act of insubordination. The burden was on DPW to prove insubordination, and DPW satisfied its burden.

Accordingly, this assignment of error lacks merit.

Assignment of Error Number 5: "The District Court's refusal to reverse or remand the decision of the City-Parish Personnel Board was erroneous because there was insufficient evidence that Dr. Chatterjee impaired the efficiency of the public service."

In reaching its decision, the Board made several factual determinations and concluded that Dr. Chatterjee's actions regarding the letter were cause for termination of his employment with the DPW. It is elementary that Dr. Chatterjee could not be disciplined without cause. Cause exits whenever the employee's conduct is detrimental to the efficient and orderly operation of the public service that employed him. An appellate court should not reverse the Board's determination of the existence of cause for a disciplinary action unless the decision is arbitrary, capricious or an abuse of discretion. Greenleaf v. DHH, Metropolitan Developmental Center, 594 So.2d 418 (La. App. 1st Cir. 1991), writ denied, 596 So.2d 196 (La.1992). After a thorough review of the record, we are

convinced that a reasonable basis exists for the Board's factual findings, and we cannot say that the findings are clearly wrong. Insubordination by failure to obey direct orders is patently detrimental to the efficient and orderly operation of an organization. See King v. Department of Transportation and Development, 607 So.2d 789 (La. App.1st Cir. 1992). Furthermore, we find the record does not reflect arbitrary or capricious action on the part of the Board in concluding that there was cause for the removal of Dr. Chatterjee from his position with the DPW.

Assignment of Error Number 6: "The District Court's refusal to reverse or remand the decision of the City-Parish Personnel Board was erroneous because the Parish Attorney that prosecuted the case on behalf of DPW also served as counsel to the City-Parish Personnel Board ."

In this assignment of error, appellant argues that the dual capacity of counsel to the Board denied him due process. This court recently answered an identical assertion in Ogg v. Louisiana Board of Chiropractic Examiners, 602 So.2d. 749 (La. App. 1st Cir. 1992). In Ogg and in the instant case, the appellant based their contentions solely on the status of the prosecuting attorneys and did not allege any specific conduct on the part of the Boards or the prosecuting attorneys that would impugn the fairness of the adjudicatory proceedings. In Ogg , we contrasted the case of Allen v. Louisiana State Board of Dentistry, 543 So.2d 908 (La. 1989), wherein the attorney for the State Board acted as the investigator and prosecutor in the case and was then asked by the Board to prepare written findings of fact and conclusions of law. The Louisiana Supreme Court found that this conduct denied Dr. Allen due process.

Our reasoning in Ogg is applicable here. First, the

formal hearing conducted by the Board was conducted by a Board member who had no connection with the prosecutor. Second, the appellant does not allege any conduct on the part of the prosecutor or the Board other than the fact the prosecutor is the Board's general counsel. This fact, standing alone, is insufficient to overcome the presumption of honesty and integrity of the Board in these proceedings, nor does it deprive the proceedings of the crucial appearance of fairness. Cf. Allen v. Louisiana State Board of Dentistry, 543 So.2d at 915.

There is no merit to this assignment of error.

Assignment of Error Number 7: "The District Court's refusal to reverse or remand the decision of the City-Parish Personnel Board was erroneous because Dr. Chatterjee's termination was an inappropriate and far too severe a form of discipline ."

In the instant case the Board determined that the DPW was justified in terminating Dr. Chatterjee's employment for cause. This determination was as much a part of the Board's function as its factfinding that Dr. Chatterjee was guilty of insubordination. Considering the evidence submitted to the Board, termination of employment was certainly among the choices of sanctions which it could reasonably impose. When judging the Board's exercise of its discretion in determining whether the punishment is commensurate with the infraction, this court cannot modify the Board's order unless it is arbitrary, capricious or an abuse of discretion. Even if we were to consider termination of employment as being on the harsh side, we cannot substitute our judgment for that of the Board that determined termination was a sanction commensurate with the infraction. See Watson v. Department of Health, 93-1170 (La.

App. 4th Cir. 1/13/94); 631 So.2d 517, writ denied, 94-0385 (La. 4/4/94) ; 635 So.2d 1126. Appellant claims he is not deserving of dismissal because it is the "death penalty of the workplace." However, he did not introduce any mitigating circumstances to justify his behavior. Furthermore, we note that insubordination, especially when it involves the failure to obey a direct order, is fatal to the chain of command necessary for the smooth operation of any organization, such as DPW.

Accordingly, we will not disturb the sanction imposed by the DPW and the Board against Dr. Chatterjee.

For the foregoing reasons, we affirm the judgment of the district court, and we cast appellant for all costs of this appeal.

AFFIRMED.

NOT DESIGNATED
FOR PUBLICATION

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 94/CA/1025
DR. KARUNAMOY CHATTERJEE
--------VERSUS-------- Parish of
East Baton Rouge
CITY OF BATON ROUGE, ET AL

On application for Rehearing.

Rehearing _____DENIED_____

"s/J.Louis Watkins, Jr."
"s/Kenneth J. Fogg"
"s/Thomas W. Tanner"

Filed __June 21 1995_____
"s/STANLEY P. LEMOINE," Clerk

The Supreme Court of the State of Louisiana

DR. KARUNAMOY CHATTERJEE
VS. NO. 95-C-1826
CITY OF BATON ROUGE, ET AL

IN RE: Chatterjee, Karunamoy Dr. ; - Plaintiff(s) ; Applying for Writ of Certiorari and/or Review ; Parish of East Baton Rouge 19th Judicial District Court Div. "C" Number 345,670 ; to the Court of Appeal, First Circuit, Number CA94 1025

October 27, 1995

Denied.

PFC
WFM
HTL
CDK
BJJ
JPV

WATSON, J. would grant the writ.

Supreme Court of Louisiana
October 27, 1995
"s/"Not legible"
Clark of Court
For the Court